IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-38

UNITED STATES OF AMERICA, *Appellant*,

v.

MARINE BANCORPORATION, INC., THE NATIONAL BANK OF COMMERCE OF SEATTLE, WASHINGTON TRUST BANK; AND JAMES E. SMITH, COMPTROLLER OF THE CURRENCY, *Appellees*.

On Appeal from the United States District Court for the Western District of Washington

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APPELLEES' JOINT MOTION TO DISMISS THE APPEAL

The appellee banks and Marine Bancorporation and James E. Smith, United States Comptroller of the Currency, herewith move for an order dismissing the appeal for failure to comply with the Rules of this Court.

As of December 21, 1973, appellant is seven days late in filing its brief on the merits. Appellant has ignored the decision of the Clerk of this Court that its time for filing ended on December 14, 1973. Since that date, appellant has utterly disregarded the

Clerk's instruction that "any request for a further extension will have to be presented to the Court." Appellant has neither filed its brief nor felt it necessary to seek more time from this Court as directed. It is upon these facts that this motion is filed.

Probable jurisdiction in this case was noted on October 15, 1973.[1] The briefing schedule called for appellant's brief on the merits and printed appendix to be served and filed on or before November 29, 1973. On November 28, 1973, appellant applied for a thirty-day extension of time in which to complete printing its brief and the appendix. Appellees, already concerned with the inordinate delays by appellant in correcting or changing its trial court record, strenuously opposed this extension, fearing that it would upset the tentative schedule for final argument then thought to be January of 1974.[2] Nevertheless, appellant was granted fifteen more days, to and including December 14, 1973. In a telephone conversation with counsel for appellee Comptroller and in his letter to the Solicitor General authorizing this limited extension, Mr. Rodak indicated that such an extension would not disturb the schedule for final argument, then tentatively set for the first week in February. Accordingly, he

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[1] In the course of filing its jurisdictional statement appellant obtained two extensions of time. The second extension, although granted, was [redacted] described in a handwritten notation in the case record folder in the Clerk's Office as being "not really needed."

[2] Even though nearly a year had passed since the January 1973 trial in this case, appellant on October 23, for the first time, "formally" requested the district court reporter to make certain changes in the record, characterizing the trial transcript as having "voids and incoherencies" and "egregious omissions." Copies of correspondence involving this aspect are on file with the Clerk of this Court.

informed appellant that any further extension must be obtained from this Court.

As noted above, appellant has now had seven additional days on its brief without permission from anyone. Moreover, appellant has not served or filed any application or request with the Court to further extend the time in which these filings might be made. Because Supreme Court Rule 34(2) provides that an enlargement of time or request therefor "must be presented to the Court within the period sought to be extended," it appears that appellant is precluded from now presenting any such request.

Through its willingness to ignore this Court's rules, appellant gains a tactical advantage which we believe this Court should not countenance. As appellant takes additional time to sharpen its argument and expand its brief, appellees' time to prepare answering briefs shrinks in proportion, assuming the schedule for oral argument is to be kept. As this case involves matters of antitrust policy and bank regulation we believe this Court's decision should be based upon a clean record and equally well considered briefs as to the merits of *both* sides of this case.

This bank merger antitrust case is on direct appeal under the Expediting Act (28 U.S.C. 29) which is intended to accelerate review and final determination. Appellant, as an agency of government, has a public duty to assist in expediting these matters. This is particularly true in this case where the mere filing of the complaint, without proof of illegality, entitles appellant to an automatic injunction notwithstanding the fact that the Comptroller of the Currency and the district court both found the proposed merger to be lawful and in the public interest.

Appellant's procrastination and failure to file its brief and printed appendix could further postpone argument and the ultimate decision in the case. The consistently successive delays engendered by appellant and its repetitious use of extensions of time within which to perform the acts necessary to bring this case to a final determination continue to seriously handicap both subject banks in daily operations as well as long-term planning. The failure of the appellant for ten months to correct its record in the lower court, as explained in its application of November 28, 1973, for another extension, is no fault of the appellees.

Appellant now simply ignores the time requirement for filing its brief and appendix. There is no reason why the appellant should not be compelled to observe the Rules of the Court and ask for extensions of time as other litigants are obliged to do. As the Solicitor General has not compiled with Rules 41(1) and 34(2), it is submitted the appeal should be dismissed.

Respectfully submitted,

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